No. 97-174

In The

Supreme Court of the United States

October Term, 1996

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; JOHN STRANNE, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE STATES OF SOUTH DAKOTA, CALIFORNIA, COLORADO, IDAHO, MICHIGAN, MONTANA, NEVADA AND UTAH IN SUPPORT OF PETITIONERS

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN*
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

**Counsel of Record*

[Additional counsel listed on inside cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

DANIEL E. LUNGREN
Attorney General
State of California

GALE A. NORTON
Attorney General
State of Colorado

ALAN G. LANCE
Attorney General
State of Idaho

FRANK J. KELLEY
Attorney General
State of Michigan

JOSEPH P. MAZUREK
Attorney General
State of Monana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

JAN GRAHAM
Attorney General
State of Utah

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The states of South Dakota, California, Colorado, Idaho, Michigan, Montana, Nevada and Utah, through their respective Attorneys General, respectfully submit a brief amicus curiae in support of Petitioners pursuant to Supreme Court Rule 37.

INTEREST OF AMICI STATES

The United States, through treaty, statute, or executive order, has created reservations within each of the Amici States. Each of the States, either directly or through its political subdivisions, imposes an ad valorem tax on property which typically supports the schools of the area. Such schools are, of course, open without restriction to tribal members.

Following this Court's decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), the States or their political subdivisions have had reaffirmed their power to finance schools or other activities through taxation of land owned in fee by tribes and tribal members. The decision of the court of appeals, however, puts into question the legitimacy of such taxation. Thus, despite the argument of the Respondent Leech Lake Band of Chippewa Indians that "this case involves a Minnesota-specific federal law, and . . . the analysis of the impact of that law depends on circumstances unique to Minnesota" (Respondent's Brief in Opposition at 4), it is virtually certain that States in the Eighth Circuit will be confronted with the argument that ad valorem taxation of any fee land in a reservation

owned by a tribal member or tribe but (1) allotted under the General Allotment Act prior to adoption of the Burke Act, 34 Stat. 132 (1906), (2) allotted under another act or treaty, or (3) originally conveyed by the United States in fee to a non-Indian is forbidden. If left standing, the Eighth Circuit's decision will mean that such States and their counties, or perhaps the tribal taxpayers themselves, will be required to engage in a parcel-by-parcel determination of whether imposition of property taxes is appropriate. Not only will such an examination be time-consuming and expensive, but it also will result in arbitrary distinctions, as is the situation here, between lands that are taxable and those that are not.

Aside from its immediate consequences with respect to the Petitioners and other States within the Eighth Circuit, the court of appeals' decision conflicts directly with the Ninth Circuit's decision in *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2727 (1994). The States have a strong interest in uniform application of doctrinal principles so directly affecting the public fisc and such a sensitive area as the taxation of Indian tribes and their members. The conflict between the circuits, moreover, is not limited to this matter. The Sixth Circuit in *United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan*, 106 F.3d 130 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3085 (U.S. June 30, 1997) (No. 97-14) ("*Saginaw*"), similarly has disagreed with *Lummi*'s reasoning and found land allotted under a treaty predating the General Allotment Act, 24 Stat. 388 (1887), immune from state ad valorem taxation to the extent owned in fee by tribal members. Postponing resolution of the issue presented here or, for that matter, the question raised in *Saginaw*

simply will invite further litigation in the remaining circuits, with this Court eventually required to address the issue. It is in the States' interest to have the controversy determined now to avoid lawsuits that carry high costs both in monetary terms and in a pernicious effect on the often fragile government-to-government relationship between States, their local subdivisions, and tribes.

Finally, the Amici States have a strong interest in assuring that, when this Court sets out a bright line rule of law, it is adhered to in the lower federal courts. This Court in *County of Yakima* did set out such a bright line rule – alienability equals taxability with respect to lands which left the public domain pursuant to Allotment Era legislation – and they believe the Eighth Circuit's decision has failed to adhere to that rule.

SUMMARY OF ARGUMENT

In *Goudy v. Meath*, 203 U.S. 146 (1906), this Court made clear its determination that when trust lands became alienable, Congress intended, unless it specifically indicated otherwise, that they also be made taxable. This Court adhered to that precedent in *County of Yakima* as did the Court of Appeals for the Ninth Circuit in the *Lummi* opinion.

The Eighth Circuit Court of Appeals, in the case at bar, and the Sixth Circuit Court of Appeals, in a case in which certiorari is also sought, have spurned that precedent and attempted to develop a rule which apparently makes taxability contingent upon whether the lands were patented pursuant to the 1906 amendments to the General Allotment Act. The proposed rule will assuredly

appear irrational both to Indians and non-Indians affected by it and would, moreover, force state and local officials to determine the history of each parcel to determine its taxability.

This Court should grant certiorari to resolve the conflict in the circuits and to assure compliance with the bright line precedents of *Goudy* and *County of Yakima*.

ARGUMENT

I

THE COURT OF APPEALS' DECISION DEMANDS A PARCEL-BY-PARCEL EXAMINATION OF TITLE TO DETERMINE TAXABILITY OF LANDS OWNED BY A TRIBE OR ITS MEMBERS AND OTHERWISE LEADS TO ANOMALOUS RESULTS.

Under the Nelson Act of 1889, 25 Stat. 642, Congress provided for the disposition of land within, inter alia, the Respondent's reservation in several different ways: allotment to individual tribal members; general homesteading to the public at large; and sale under the "pine lands provisions" in sections 3 and 4 of the Act. *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820, 823 (8th Cir. 1997). In concluding that land allotted after adoption of the Burke Act in 1906 was taxable, the Eighth Circuit relied on the explicit incorporation of the General Allotment Act into that section of the Nelson Act dealing with the allotment of lands to tribal members but found nontaxable lands that left the public domain through the other provisions of the 1889 statute, together with lands allotted prior to the Burke Act, to the extent now held in fee by tribal members. Consequently, of the twenty-one

parcels at issue here, eight were held nontaxable because they had not been allotted, and the tax status of the remaining thirteen parcels was left for determination on remand on the basis of whether they were allotted before or after passage of the Burke Act.

It is difficult to conceive of a more cumbersome application of the principles articulated in *County of Yakima*. The court of appeals' decision means, as a practical matter, that state and county officials, or possibly individual taxpayers, will be required to determine how each parcel of land within a reservation left the public domain – a singularly daunting task in States where reservations are large and the affected parcels number in the thousands, not less than two dozen. No less troublesome is the fact that, under the Eighth Circuit's reasoning, a parcel that left the public domain by virtue of a homestead claim by a nonmember will not be taxable if acquired subsequently by a member, while a neighboring parcel that left the public domain through allotment and then fee patent will be taxable. These results, in short, are accompanied by a very substantial burden on state and local government tax administrators whether measured by litigation or other out-of-pocket costs or by public reaction to seemingly illogical taxation rules. This Court should not wait until another day to decide whether this burden should be borne.

II

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEAL FOR THE EIGHTH, SIXTH, AND NINTH CIRCUITS.

In *Lummi*, the Ninth Circuit determined that reservation land patented under a treaty, rather than under the General Allotment Act, was subject to ad valorem taxation. Four years later, the Sixth Circuit in *Saginaw* and the Eighth Circuit below found precisely to the contrary by concluding that only land allotted under the General Allotment Act and thereafter patented in fee, and not land patented under other treaties or acts, thereby became taxable unless the provisions of the General Allotment Act otherwise were made explicitly applicable.* To state the matter another way, the Ninth Circuit found that if the land in question was "alienable, it is taxable" (5 F.3d at 1357), while the Sixth and Eighth Circuits found to the contrary (*Saginaw*, 106 F.3d at 130; *Leech Lake Band*, 108 F.3d at 829).

The conflict here is direct, and it is quite unlikely to be resolved by future litigation in the lower federal courts. Even superficial analysis of the three majority decisions and two dissents in the cases involved in this conflict reveals that the judges of the courts below were inexorably divided on the essential legal question presented by the Petition and on the meaning of this Court's

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* The Eighth Circuit, as discussed above, took the issue one step further, holding that even land allotted expressly subject to the allotment provisions of the General Allotment Act was taxable only if allotted *after* adoption of the Burke Act.

decision in the *Yakima* case; i.e., whether section 5 of the General Allotment Act is the source of the authority of States to tax reservation fee land owned by tribes or their members. There is additionally little chance that allowing the conflict to go unaddressed will further "illuminate" the issue for the arguments do not demonstrate a progression toward a conclusion. *See generally* Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982) *quoted in* Robert L. Stern, et al., *Supreme Court Practice* 171 (7th ed. 1993).

The difficulties raised by the decision below are, for the reasons discussed in the preceding argument section, particularly vexing both for local officers of governments charged with taxation responsibilities and to tribal members who hold land in fee. Even if these difficulties are the price of doctrinal consistency, this Court should make clear now whether such price must be paid rather than awaiting what can only be further litigation with no less inconsistent holdings.

III

THIS COURT'S DECISION IN *COUNTY OF YAKIMA* CLEARLY HELD THAT ALIENABILITY EQUALS TAXABILITY.

The Amici States believe it plain that the judges of the courts of appeal appear to be in intractable conflict as to the meaning of this Court's decision in *County of Yakima*. Nonetheless, the Amici States respectfully submit that the reasoning in *County of Yakima* is because no other arrangement made any sense. Thus, *County of Yakima* concluded on the basis of *Goudy*: "[W]hen § 5 rendered

the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." 502 U.S. at 263-264.

The essence of the decision below is grounded in a misreading of the very next line of *County of Yakima*, which stated, "The Burke Act proviso, enacted in 1906, made this implication of § 5 explicit, and its nature more clear." 502 U.S. at 264. The court below has reasoned that because what is drawn from section 5 is but an implication, there is no "unmistakably clear congressional intent to allow state taxation." *Leech Lake Band*, 108 F.3d at 827. The flaw in the argument is its assumption that what is "implied" may not be "unmistakably clear." It was, however, "unmistakably clear" to the *Goudy* court with respect to the pre-Burke Act version of the General Allotment Act that alienability equaled taxability. *See Goudy*, 203 U.S. at 149. The contemporaneous analysis in *Goudy* of the result of making land alienable – and of how clear that result was – should certainly prevail over the latter-day analysis of court of appeals here.

Moreover, this Court in *County of Yakima* effectively found the implication to be "unmistakably clear" when it referred to a later-enacted Burke Act as a proviso which "*reaffirmed* for such 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." *County of Yakima*, 502 U.S. at 264 (emphasis added) (footnote omitted). What is "reaffirmed" by necessity must have been already established.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
(605) 773-3215
Counsel of Record